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## How (Not) to Think Like a Punisher

Alice G. Ristroph

*Georgetown University Law Library*, [agr33@law.georgetown.edu](mailto:agr33@law.georgetown.edu)

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# GEORGETOWN LAW

## Faculty Working Papers



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### How (Not) to Think Like a Punisher

61 Fla. L. Rev. 727 (2009)

Alice G. Ristroph

Associate Professor  
Seton Hall University School of Law  
and

Visiting Professor of Law  
Georgetown University Law Center  
[agr33@law.georgetown.edu](mailto:agr33@law.georgetown.edu)

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## HOW (NOT) TO THINK LIKE A PUNISHER

*Alice Ristroph*\*

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### I. INTRODUCTION

The new sentencing provisions of the *Model Penal Code* (MPC) forcefully assert the nature of sentencing as *judicial* province. “One underlying philosophy of the revised *Code* is that sentencing is, at its core, a judicial function.”<sup>1</sup> Specifically, the new provisions aim to secure judicial discretion against unwelcome intrusions such as legislatively mandated minimum sentences, the more rigid forms of sentencing guidelines, a renewed emphasis on the role of the jury, and public demands for harsher sentences.

But why, exactly, is sentencing a fundamentally judicial task? What sort of task is sentencing, anyway? Perhaps choosing the right punishment for an offender is an art, a matter of *phronesis* or practical wisdom. On this account, sentencing takes practice, skill, and inevitably, judgment. But there are other possibilities. Sentencing may be science rather than art; it may require the analysis of empirical data, and the question of appropriate

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\* Associate Professor, Seton Hall University School of Law. This Article was prepared for presentation at a panel on the Model Penal Code Sentencing Project at the January 2009 annual meeting of the Association of American Law Schools. For lively conversation and helpful comments, I am grateful to panel convener Christopher Slobogin and to my fellow panelists Doug Berman, Kevin Reitz, and Bob Weisberg.

1. MODEL PENAL CODE: SENTENCING § 6A.02 cmt. b, at 63 (Tentative Draft No. 1, 2007); see also *id.* at 306 (“[A] driving philosophy of the Model Penal Code: Sentencing revision is that the judiciary should be the . . . most powerful institution within the multilevel, multi-actor system for criminal sentencing.”).

punishment may be one for which there are objectively ascertainable right and wrong answers. Or perhaps sentencing is a science in the sense that Alexis de Tocqueville invoked when he described lawyers as “masters of a science,” an enterprise requiring “certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas.”<sup>2</sup> To think like a (proper) sentencer, maybe one needs to think like a lawyer, and not like a partisan advocate, but a neutral jurist—a judge.

This Article examines the several and sometimes contradictory accounts of sentencing in the new *MPC* provisions. The seeming dichotomy between art and science is not the only contrast that may illuminate an inquiry into the nature of sentencing. One might also distinguish between an account of sentencing as a complex legal and political process, on one hand, and normative claims about the purposes of punishment, on the other. Briefly, I argue here that the new *Code* is at its best when it acknowledges the legal and political complexities of sentencing, and at its worst when it invokes the rhetoric of desert. When the *Code* focuses on the sentencing process in political context, it offers opportunities to deploy both practical wisdom and empirical analysis that may actually make American sentencing less arbitrary and, importantly, less frequent. When the *Code* retreats to retributive or desert theory as a source of sentencing reform, it appeals to indeterminate and unpredictable principles that threaten to undermine the new provisions’ more salutary proposals.

Another avenue of inquiry would examine sentencing through the interplay of theory and practice. We might ask whether a theory of punishment can produce a theory of sentencing, one which could in turn provide a useful guide for sentencing practices. The new *Code*’s attention to the intersection of theory and practice takes form in its endorsement of limiting retributivism. At their best, the arguments collectively termed “limiting retributivism” have two great virtues. First, they are deeply concerned with the mechanics of actual sentencing practice, such as institutional design, empirical data, and interactions between various actors in a sentencing system. Second, they are (again, at their best) not particularly retributive. Often, limiting retributivism is not so much a punishment theory as an account of the uses—and limits—of punishment theory for sentencing practice. But at their worst, the claims of limiting retributivism can display all the vices of punishment theory: unsupportable and unverifiable claims to punitive power, divorced from a broader political theory and indifferent to the real-world implications of its claims.

This Article examines the relationship between the new *Code*’s statement of sentencing purposes and its concrete institutional, procedural,

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2. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 217 (Bruce Frohmen, ed. 2003) (1889).

and practical recommendations in the remaining proposed revisions. The danger, I argue, is that the retributive moments of the *Code*—the moments when it calls upon decision-makers to think like punishers—will impede the opportunities it provides for meaningful sentencing reform.

Part II provides an overview of some key features of the revised sentencing provisions, noting that the most significant change comes not in the *Code*'s statement of sentencing purposes but in the interpretation and implementation of those purposes. Part III examines in detail the proportionality requirement of the revised *Code*, with a specific (and critical) focus on the role of retributivism and desert. Part IV continues the critique of desert, arguing that the revised *Code*'s emphasis on desert is in tension with, and likely to undermine, its professed commitment to more empirically grounded sentencing practices. Finally, Part V returns to the question whether sentencing is a distinctively judicial task.

## II. FROM PURPOSE TO PRACTICE

Promising “new underpinnings of punishment theory,”<sup>3</sup> the revised sentencing provisions begin with a statement of their own purposes. The *Code* first identifies an apparently retributive requirement that punishments be “proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders.”<sup>4</sup> Other goals—deterrence, rehabilitation, incapacitation, victim restoration, and community reintegration—are to be pursued as well, but only “within the boundaries of proportionality.”<sup>5</sup> The new *Code* also identifies parsimony—a “no more severe than necessary” provision—as a goal, along with judicial discretion, individualized sentences, greater uniformity and equality, humane prisons, and increased attention to empirical research on “the effectiveness of criminal sanctions as measured against their purposes.”<sup>6</sup>

Importantly, the new § 1.02 (like its predecessor in the original *Code*) identifies the purposes of the sentencing provisions themselves; it is not framed as a list of the purposes of punishment.<sup>7</sup> To understand the provisions, and to assess their likely impact, it is necessary to keep in mind this difference between the goals of punishment and the goals of the sentencing process. Of course, the two categories overlap to some degree, for one purpose of the sentencing process is to ensure punishments.

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3. MODEL PENAL CODE: SENTENCING, *Reporter's Introductory Memorandum* xxx (Tentative Draft No. 1, 2007).

4. *Id.* § 1.02(2)(a)(i). As discussed below, the *Code*'s drafters are somewhat equivocal on the relevance of retributive theory to sentencing. See *infra* text accompanying notes 16–18 and text accompanying notes 59–66.

5. *Id.* § 1.02(2)(a)(ii).

6. *Id.* § 1.02(2)(b)(vii); see also *id.* § 1.02(2)(a)-(b).

7. Entitled “Purposes; Principles of Construction,” § 1.02(2) identifies “[t]he general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system.”

Whatever we identify as the purpose of punishment will also be a purpose of the sentencing process, but the sentencing process may have additional independent aims. The first part of the new § 1.02(2), subsection (a), lists several sentencing goals that are also goals of punishment itself: rehabilitation, deterrence, incapacitation, and so forth.<sup>8</sup> In contrast, subsection (b) identifies goals of the sentencing process that are independent of the purposes of punishment. For example, uniformity among sentences is not itself a reason to impose punishment; one could achieve uniform sentences by punishing no one. Similarly, attention to empirical research on sentence effectiveness may be an aim of the sentencing process, but it is not itself a reason to punish. The difference between purposes of punishment and purposes of sentencing procedures is critical to the *Code*'s discussion of proportionality, as I elaborate below.

In the five years since new draft provisions were first released, this statement of purposes has attracted more commentary than any other aspect of the *Code*. The attention is somewhat surprising, given that the revisions to § 1.02(2) are much less radical than the remainder of the proposed revisions. Like the new § 1.02, the original § 1.02 urged the pursuit of utilitarian goals within apparently deontological limits.<sup>9</sup> Like the new § 1.02, the original § 1.02 aimed at differentiated sentences that corresponded to the relative severity of different offenses.<sup>10</sup> Like the new § 1.02, the original § 1.02 emphasized judicial discretion, individualized sentences, and reliance on empirical research.<sup>11</sup> Meet the new *Code*, same as the old *Code*.

More precisely, meet the new § 1.02, substantially similar to the old § 1.02. While the stated purposes of the sentencing provisions have not changed radically, the interpretation and implementation of these purposes *are* significantly different in the new *Code*.

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8. Subsection (a) of 1.02(2) is ostensibly concerned with the "general purposes of sentencing in individual cases," whereas subsection (b) is concerned with the purposes of the system as a whole. See MODEL PENAL CODE: SENTENCING § 7.XX cmt. b., at 267 (Tentative Draft No. 1, 2007). But it would not be quite accurate to explain subsection (a) as a statement of the purposes of punishment (which are also purposes of the sentencing system). Included in subsection (a) is a parsimony principle—"to render sentences no more severe than necessary"—and parsimony is not itself a reason to punish. See *id.* § 1.02(2)(a)(iii).

9. See MODEL PENAL CODE § 1.02(2)(a)-(c) (1962) (identifying utilitarian goals of prevention, correction, and rehabilitation, along with "safeguard[ing] offenders against excessive, disproportionate or arbitrary punishment"). The prohibition of excessive or disproportionate punishments was understood by its drafters to set forth limitations defined by "a common sense of justice." Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 468 (1961). For further discussion, see *infra* note 21.

10. MODEL PENAL CODE § 1.02(1)(e) (1962).

11. *Id.* § 1.02(2)(e) ("to differentiate among offenders with a view to a just individualization in their treatment"); § 1.02(2)(g) ("to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders").

### A. *A New Understanding of Proportionality*

First, with respect to interpretation: notwithstanding the reference to excessive and disproportionate sentences in the original *Code*, the drafters of the new provisions clearly view their proportionality limitation as an innovation. The new § 1.02 is said to “incorporate[] meaningful proportionality limitations not envisioned in the original *Code*.”<sup>12</sup> Perhaps the emphasis is on the word *meaningful*; indeed, the proportionality limitation of the old *Code* had little practical effect.<sup>13</sup> To make proportionality meaningful, the new *Code* offers a retributive or quasi-retributive interpretation of it. Sentences should be “within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders.”<sup>14</sup> As explained in the commentary, this account of proportionality is explicitly drawn from theories of limiting retributivism, under which the offender’s desert sets upper and lower limits to the sentence.<sup>15</sup> Within those outer limits, sentencers may take into account utilitarian considerations other than desert. The new *Code* is somewhat equivocal on the extent to which it endorses retributive principles; the drafters do not include “retribution” or even “desert” in the recommended statutory language.<sup>16</sup> The new draft explicitly declines to “codify a ‘just deserts’ philosophy of criminal penalties.”<sup>17</sup> Notwithstanding this unease with the rhetoric of retribution and just deserts, the commentary indicates that the drafters understand proportionality to be a retributive concept.<sup>18</sup>

This interpretation of proportionality is new to the *Code*. The original *Code* made no mention of desert or retribution in its statement of purposes, and its explanatory notes seemed to reject desert explicitly.<sup>19</sup> The original

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12. See MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. a, at 3 (Tentative Draft No. 1, 2007).

13. See MODEL PENAL CODE: SENTENCING, *Reporter’s Introductory Memorandum* xxviii–xxix (Tentative Draft No. 1, 2007).

14. MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (Tentative Draft No. 1, 2007).

15. MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. a-b, at 3–8 (Tentative Draft No. 1, 2007).

16. MODEL PENAL CODE: SENTENCING § 1.02(2), *Reporter’s Note*, at 30 (Tentative Draft No. 1, 2007) (“The revised Model Penal Code avoids use of the term ‘retribution’ . . . and speaks instead of ‘proportionality’ constraints on utilitarian sanctions.”).

17. MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. i., at 17 (Tentative Draft No. 1, 2007).

18. See, e.g., *id.* § 1.02(2), *Reporter’s Note* 29 (equating proportionality limits with retributive limits); *id.* § 6B.03 cmt. b., at 179 (referring to the factors relevant to proportionality—offense gravity, harm to victims, and offender blameworthiness—as “retributive anchor points”); *id.* § 6B.03 cmt. c., at 181 (noting a widespread trend “toward a hybrid approach of retributive and utilitarian goals in sentencing reform” and endorsing that trend).

19. MODEL PENAL CODE § 7.01 cmt. 3, at 227 (1962) (rejecting desert and retribution as bases for imposing imprisonment).

*Code* did, as noted above, codify a proportionality limitation whose meaning was apparently derived from “the common sense of justice,”<sup>20</sup> but justice was not conflated with desert: it was widely understood that the *Code* rejected desert as a sentencing principle.<sup>21</sup> Contemporary members of the American Law Institute (ALI)—and contemporary sentencing theorists—would do well to revisit the notion that concepts of proportionality (and justice) can stand independently of claims of desert. As discussed in Part III, the new *Code* reflects an unfortunate and unfounded assumption that proportionality is a necessarily retributive principle. One way to understand the difference between the old and the new proportionality is that the old proportionality requirement was a goal of the sentencing system, independent of the goals of punishment, whereas the new proportionality requirement is linked to a retributive account of the purpose of punishment itself.

### B. *New Roles for Commissions and Judges*

The new statement of sentencing purposes is not a mere hortatory throat-clearing to precede the meat of the new provisions. The drafters are explicit about their intention to make § 1.02 relevant to the entire sentencing process, and they offer concrete guidance toward that end.<sup>22</sup> Here, I want to focus on the implementation of the proportionality requirement, especially as it interacts with the commitment to judicial discretion, and the implementation of the new *Code*’s commitment to “evidence-based sentencing.”

Who should decide how much punishment is proportionate to a given

20. Wechsler, *supra* note 9, at 468.

21. See, e.g., Norval Morris, *Sentencing Under the Model Penal Code: Balancing the Concerns*, 19 RUTGERS L.J. 811, 814–15 n.12 (1987) (“The Comment specifically rejects as a valid reason for imprisonment that the person ‘deserves’ punishment for the bad deed committed.” (citing MODEL PENAL CODE § 7.01 cmt. 3, at 227 (1985))). As retributive theory became more popular among Anglo-American academics in the late twentieth century, some scholars argued that the Model Penal Code implicitly reflected retributive principles. See, e.g., Paul H. Robinson, *Criminal Law Scholarship: Three Illusions*, 2 THEORETICAL INQUIRIES L. 287, 290 (2001) (identifying desert as one of several purposes embraced by the original MPC). The commentary to the MPC was revised in 1985, and the new commentary contained language that could be interpreted as leaving room for desert as a non-determinative, secondary sentencing principle. For example, the 1985 comments explained that the *Code* was “based on the premise that ‘desert’ alone is not a sufficient justification for punishment.” MODEL PENAL CODE AND COMMENTARIES, Introduction to Art. 6 and 7, at 16 (1985); see also MODEL PENAL CODE AND COMMENTARIES § 1.02 cmt. 3, at 21 (stating that the *Code* was focused on crime prevention, “leaving no room for dispositions motivated merely by vindictive or retributive considerations.”). For more discussion of the revisionist retributivist reading of the *Code*, see Michele Cotton, *Back With A Vengeance: The Resilience of Retributivism as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1318–24 (2000).

22. See MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. a, at 3 (Tentative Draft No. 1, 2007); *id.* § 7.ZZ cmt. b, at 322–23 (noting “the revised *Code*’s broad-based effort to give greater prominence and effect to the purposes provision than in the 1962 *Code*”).



offense? Though the proportionality requirement of the new § 1.02 is, by its own terms, intended to guide all “official actors” in the sentencing process, judges and sentencing commissions are most explicitly charged with ensuring proportionate sentences. The new *Code* recommends the creation of a permanent sentencing commission that will “set presumptive sentences for defined classes of cases” in accordance with offense gravity, harm to victims, and offender blameworthiness—the same proportionality factors identified in § 1.02.<sup>23</sup> The commentary explains that this task entails a moral judgment and is necessarily imprecise, but, consistent with the theory of limiting retributivism, the commission is expected to “find agreement that a defined presumptive sentencing range for each category of case is safely within the outer limits of undue lenity or severity.”<sup>24</sup> Further, the commission should devise guidelines that “invite sentencing courts to individualize sentencing decisions in light of the purposes in § 1.02(2)(a),” and the guidelines may prioritize among the various principles of § 1.02(2)(a).<sup>25</sup> Again, the commentary is fairly specific in its recommendations for implementing proportionality. For example, a two-dimensional sentencing grid “can assist the commission in the goal of furthering proportionality in punishment across different offenses.”<sup>26</sup>

Judges, too, are empowered to make real the *Code*’s commitment to proportionate sentences, and their power in this regard exceeds that of the sentencing commission. In general, trial court judges are to exercise their sentencing authority consistent with § 1.02. More specifically, judges may depart from the guidelines “when substantial circumstances establish that the presumptive sentence . . . will not best effectuate the purposes stated in § 1.02(2)(a).”<sup>27</sup> This provision seems to give judges power to overrule the sentencing commission on issues of proportionality, except the new *Code* provides that judges may not depart from the guidelines based on “mere disagreement” about the appropriate sentence for ordinary cases.<sup>28</sup> Instead, departures should occur only when aggravating or mitigating “factors take the case outside the realm” of the ordinary cases anticipated by the guidelines.<sup>29</sup> Judges are further empowered to render “extraordinary departures” from otherwise mandatory sentences when “extraordinary and compelling circumstances demonstrate . . . that the mandatory penalty would result in an unreasonable sentence in light of the purposes in

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23. MODEL PENAL CODE: SENTENCING § 6B.03(2), at 178 (Tentative Draft No. 1, 2007); *see also id.* § 6.A.01 (requiring establishment of permanent sentencing commission to develop sentencing guidelines).

24. *Id.* § 6B.03 cmt. b., at 180 (Tentative Draft No. 1, 2007).

25. *Id.* § 6B.03(4)–(5), at 178.

26. *Id.* § 6B.02 cmt. c., at 163.

27. *Id.* § 7.XX(2), at 264.

28. *Id.* § 7.XX(2)(b), at 264.

29. *Id.* § 7.XX(2)(a), at 264.

§ 1.02(2)(a).”<sup>30</sup> These two departure standards—“substantial circumstances” for most departures and “compelling circumstances” for extraordinary departures from purportedly mandatory sentences—give sentencing courts considerable power to implement their judgments of proportionality. This allocation of power reflects “a driving philosophy” of the revised *Code* that “the judiciary should be the central and most powerful institution within the multilevel, multi-actor system for criminal sentencing.”<sup>31</sup>

A proposed section on appellate review of sentences would give the judiciary still greater power to assess and impose proportionate sentences. Under the draft § 7.ZZ, a defendant may appeal a sentence on the ground that it is “too severe,” and the appellate court is empowered to vacate or modify the sentence if the court finds it to be disproportionate given the factors articulated in § 1.02(2)(a)—offense gravity, victim harm, and offender blameworthiness.<sup>32</sup> This “subconstitutional proportionality review” is envisioned by the drafters of the new *Code* to provide “greater bite” than the weak proportionality requirement that federal courts have found in the Eighth Amendment.<sup>33</sup> The commentary faults the Eighth Amendment standard as “flexible” in its consideration of both retributive and utilitarian goals of punishment and contrasts the Eighth Amendment standard to the *Code*’s proportionality requirement, which is based on “the standard indices of retributive or deserved penalties.”<sup>34</sup> Thus, in this appellate review provision, one sees the hope that retribution will provide stronger limits to sentence severity than other punishment theories. As I discuss in the following part, that hope is misplaced.

On the account in the new *MPC* sentencing provisions, determinations of proportionality are not the exclusive province of any single actor in the sentencing system. Ideally, considerations of proportionality should guide each decision-maker, including the legislature, the sentencing commission, the prosecutor, the trial court, and the appellate court. But it is the judgments of the sentencing commission, reflected in presumptive guidelines, and those of courts, reflected in departures or modifications on appeal, that will be most important to sentencing outcomes.<sup>35</sup> And between

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30. *Id.* § 7.XX(3)(b), at 265.

31. *Id.* § 7.07B cmt. i., at 306.

32. *Id.* § 7.ZZ(2) at 318; *id.* § 7.ZZ(6)(b). This provision has been submitted to the American Law Institute (ALI) for discussion purposes, but it has not been presented for formal approval.

33. *Id.* § 7.ZZ cmt. g., at 329; *see also id.* § 1.02(2) cmt. d., at 10–11.

34. *Id.* § 7.ZZ cmt. g., at 329–30. That the *Code*’s drafters are more concerned with overly severe sentences than with unduly lenient ones is suggested by an asymmetry between the grounds for appeal and the authority of the appellate court. Either the defendant or the government may appeal a sentence as too severe or too lenient, *id.* § 7.ZZ(2), but the appellate court is authorized to modify a sentence only on the grounds of excessive severity, *id.* § 7.ZZ(6)(b).

35. Of course, the legislature could take control over proportionality assessments by enacting strict mandatory sentences. The revised *Code* disapproves of mandatory sentences, as will

the sentencing commission and the courts, the latter has the last word: “the sentencing guidelines should be viewed as ‘first drafts’ of proportionate sentences for ordinary cases, not as final pronouncements for all cases.”<sup>36</sup>

### C. Evidence-Based Sentencing

So far, I have focused on the interpretation and implementation of the new *Code*’s proportionality requirement. But the new sentencing provisions also offer extensive guidance on the implementation of other purposes identified in § 1.02. Of particular interest—and, I suspect, of greatest practical impact—is a broad commitment to the collection and dissemination of information: to transparency in the sentencing system, to research on the consequences of different kinds of penalties, and to “impact statements” that measure and forecast prison populations, fiscal costs, and the distribution of penalties among different demographic groups.<sup>37</sup> In the new sentencing provisions, information collection and analysis is identified as both an end in itself and as a means to other goals—such as the production of more uniform sentences and the reduction of racial disparities. Sentencing is not exactly a science, and the new *Code* does not pretend that it is. But nor is sentencing strictly an art, or an exercise in normative moral reasoning. On many sentencing questions, it is possible to collect and consider relevant empirical data.

Like the proportionality requirement, the emphasis on data was present in the original *Code*.<sup>38</sup> And as is true of the proportionality requirement, the new *Code* provides much more specific guidance on implementation than did the original *Code*. With respect to evidence-based sentencing, it is the sentencing commission rather than the judiciary that has foremost responsibility for making the aspiration a reality. The commission is directed to develop “a correctional-population forecasting model” and to conduct research and data collection across a number of substantive areas.<sup>39</sup> At least once a year, the commission should use the forecasting model to project “sentencing outcomes”—e.g., how many people will be sentenced—for existing policies, and the commission should also project

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apparently be reflected in the not-yet-drafted § 6B.05. *See id.* § 6B.03 cmt. f., at 184.

36. *Id.* § 1.02(2) cmt. b., at 7; *see also id.* at cmt. d., 10–11 (“The sentencing commission is not the sole, or even the most powerful, actor in the revised Code’s sentencing structure with authority to make proportionality determinations. . . . The final arbiters of proportionality in individual cases, under the revised Code, are the courts.”).

37. *See, e.g., id.* § 1.02(2)(vii)–(viii); *id.* § 1.02(2) cmt. n., at 21 (noting the *Code*’s embrace of “evidence-based” sentencing).

38. *See* MODEL PENAL CODE § 1.02(2)(g) (1962); *see also* MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. n., at 42 (Tentative Draft No. 1, 2007) (noting that the new *Code* “retains the spirit” of the original § 1.02(2)(g), “but employs more directive language”).

39. *See* MODEL PENAL CODE: SENTENCING § 6A.04(1)–(2) (Tentative Draft No. 1, 2007); *id.* § 6A.07, at 133–34. To enable this research, the new *Code* explicitly provides that the sentencing commission should employ a research director and supporting staff. *Id.* § 6A.03(1)–(2), at 84.

likely outcomes when new policies are introduced.<sup>40</sup> The sentencing commission is also directed to conduct an omnibus review of the sentencing system every ten years. The omnibus review should address, among other things, the extent to which the sentencing system is fulfilling the purposes identified in § 1.02(2).<sup>41</sup> In addition to these reports, the commission is to collect and analyze data on a number of specific questions, such as the effect of offender and victim characteristics on the sentence imposed.<sup>42</sup>

Two areas of data analysis are of particular importance: dollars and demographics. First, the new *Code* repeatedly emphasizes the commission's role in predicting and reporting the monetary cost of sentencing policy.<sup>43</sup> The commission is to ensure that we have detailed information about what we are spending to punish. This task is crucial because as prison populations have steadily increased in the United States, only one factor seems even partially successful as a source of outer limits—the price tag.<sup>44</sup> If one aim of sentencing reform is a reduction in the incarcerated population, the promulgation of detailed fiscal impact statements may be the most effective mechanism to get there. Experience suggests that dollars are more likely to serve as a limiting principle than desert.

Second, and perhaps more controversially, the new *Code* directs sentencing commissions to investigate discrimination and inequities in the sentencing system, and to project the racial impact of sentencing policies.<sup>45</sup> Demographic projections are one piece of the new *Code*'s efforts to “eliminate inequities in sentencing across population groups.”<sup>46</sup> The drafters identify racial and ethnic minorities as “population groups” of particular interest, but leave the language broad enough to encompass other “vulnerable groups” that may be subject to discrimination in the criminal justice system.<sup>47</sup> Importantly, the commentary notes that the mere fact of racial disparities, standing alone, is not sufficient reason to reject a given sentencing policy.<sup>48</sup> In some instances, disparate racial impacts at

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40. *Id.* § 6A.07(1), at 133.

41. *Id.* § 6A.09, at 147–48.

42. *Id.* § 6A.05(2)(c), at 100.

43. *See, e.g., id.* § 6A.07, at 133.

44. This has been most evident in states with huge prisoner populations such as California and Texas. *See, e.g.,* Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 207 (2008); *see also* LITTLE HOOVER COMMISSION, STATE OF CALIFORNIA, BEYOND BARS: CORRECTIONAL REFORMS TO LOWER PRISON COSTS AND REDUCE CRIME, *Executive Summary* IV (1998), available at <http://www.lhc.ca.gov/studies/144/report144.pdf>; *see generally* Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 80–84 (2008).

45. MODEL PENAL CODE: SENTENCING § 6A.05(2)(f), at 100 (Tentative Draft No. 1, 2007); *id.* § 6A.07(3), at 133.

46. *Id.* § 1.02(2)(b)(iii), at 2.

47. *Id.* § 1.02(2) cmt. j., at 17–18.

48. *See id.* § 6A.07 cmt. d., at 138.

sentencing are the product of racial patterns in criminal behavior.<sup>49</sup> But, some punishment disparities *are* traceable to bias in the criminal justice process, and the new demographic impact statements are aimed to “force[] these facts . . . into the open.”<sup>50</sup>

The sentencing commission is not the only decisionmaker charged with attention to demographic disparities. For example, a trial court judge may choose to interpret a statute or guideline in the manner that would minimize racial or ethnic disparities.<sup>51</sup> Still, judges will not necessarily be well-positioned to assess broad demographic patterns, and the collection of such data is primarily the responsibility of the sentencing commission.

#### D. *A New Conception (or Two) of Sentencing*

The two broad themes of the new *Code* discussed here—proportionality and evidence-based sentencing—suggest two different conceptions of sentencing. The *Code*’s new account of proportionality assumes that sentencing requires a moral judgment of the offender’s desert. Sentencing, on this account, is not a hard science or a mathematical calculation; it requires discretion, moral reasoning, and the exercise of judgment. Not surprisingly, though sentencing commissions may offer the first word on proportionate sentences, judges get the last. In the individual case, sentencing is a judicial function.

The quest for evidence-based sentencing presents a somewhat different conception. It assumes that facts matter as much as or more than moral judgments. Specifically, the new directives to sentencing commissions to gather and analyze data assumes that sentencers need to know costs, demographic impact, recidivism statistics, and other facts in order to choose sentencing policy. Again, the notion of evidence-based sentencing is not quite a claim that sentencing is a science, but it is a view of sentencing as much more scientific than a desert judgment.

The two approaches are in some tension. To resolve the tension, it might be argued that the divergent approaches simply reflect the difference between the particular case and systemic outcomes. Sentencing as a matter of desert judgments focuses on the individual offender, while sentencing as a matter of empirical evidence focuses on aggregate outcomes and the system as a whole. This explanation is not entirely satisfactory, given the revised *Code*’s emphasis that proportionality is a matter of comparative or relative punishment severity. As we explore the nature of sentencing, it is important to consider both the individual and systemic perspectives. As the next two parts will suggest, however, desert-based proportionality and evidence-based sentencing are not easily reconciled.

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49. *Id.* at 138–39.

50. *Id.* at 139.

51. *Id.* § 7.XX cmt. b., at 268.

In short, the revised *Code* sets forth mechanisms to turn broad goals into meaningfully different practices. Proportionality—understood as a deontological limitation on consequentialist goals—and evidence-based sentencing are important goals, and it is fortunate that the ALI has devoted substantial efforts toward realizing them. But for all its attention to practical mechanisms, the *MPC* sentencing project has paid relatively little attention to available evidence of the actual operation of desert claims in sentencing decisions. The next two parts explore the ways in which desert undermines, or is at odds with, the commitments to proportionality and evidence-based sentencing.

### III. DESPERATELY SEEKING PROPORTIONALITY

For a few reasons, the *Code*'s new version of a proportionality requirement is unlikely to lead to changes in American sentencing practices. First, the new *Code* equivocates on what proportionality actually means; the drafters seem reluctant to embrace fully retribution or just deserts, even as they assume that proportionality is an inherently retributive idea. Second, if the new *MPC* proportionality is a desert-based principle, it will be subject to the indeterminacy and elasticity that have always plagued desert judgments. Third, there is likely to be considerable political opposition to any sentencing system that allows judicial determinations of desert to trump popular desert judgments.

#### A. Ambivalence about Retribution

By its own terms, § 1.02(2) defines a proportionate sentence as one that corresponds to offense gravity, harm, and offender culpability. These factors are listed as three independent considerations, but neither the *Code*'s commentary nor broader sentencing literature supports this characterization. In most accounts, the “gravity” of an offense is itself a function of the harm to the victim and the offender’s culpability.<sup>52</sup> Putting aside this variation on the concept of offense gravity, the new § 1.02(2) recreates a juggling act that is characteristic of recent academic discussions of proportionality and desert. In this act, familiar terms are invoked and defined in terms of one another; the conceptual insights are few and the practical upshot is unclear. Proportionality is often defined in terms of desert, and desert in terms of “offense gravity” or “crime seriousness,” and crime seriousness in terms of harm and culpability, and culpability in terms

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52. In an influential study, Andrew von Hirsch argues for a theory of proportionate sentencing that makes deserved punishment a function of crime seriousness. ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 45–46 (1985). Crime seriousness, which seems equivalent to the *MPC*'s term “gravity of the offense,” is in this account determined with reference to harm and culpability. *Id.* at 64; see also Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 567 (2008) (defining offense gravity as a function of harm, culpability, violence, and magnitude).

of blameworthiness, and blameworthiness in terms of desert.<sup>53</sup> What was desert, again? It is a matter of moral intuition, on some accounts; on others, it is a “placeholder” for still other values.<sup>54</sup> As a grand finale to the juggling act, desert is sometimes simply equated with justice—as though justice were itself a transparent and uncontested notion.<sup>55</sup>

Perhaps it is unfair to lump together so many different accounts of desert, some of which reflect careful attempts to achieve conceptual clarity. More charitably, one might say that criminal desert is typically described as a function of crime seriousness (or offense gravity), which is itself the product of two components: the tangible harm of the crime, and a less tangible factor described as culpability or blameworthiness. But even on this account, desert remains elusive. Harm is meaningful only up to a point; we might agree that murders and rapes cause harm, but the harm of many other offenses is a matter of continuing dispute.<sup>56</sup> Culpability or blameworthiness is still more inchoate, and sentencing theorists tend to focus on whether certain factors are relevant to culpability instead of explaining what culpability is.<sup>57</sup> Even when one strives to be charitable, it is difficult to escape the conclusion that desert theory takes a widely held but imprecise intuition that wrongdoers should be punished and attempts, without much success, to impose onto this intuition philosophical rigor. Somewhere in the resulting theory, couched in the language of culpability, blameworthiness, moral wrong, desert, or justice, one always reencounters the original mushy intuition.

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53. See ANDREW ASHWORTH & ANDREW VON HIRSCH, *PROPORTIONATE SENTENCING* (2005); VON HIRSCH, *supra* note 52, at 34–36, 64; Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 708–10 (2005).

54. See generally MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997) (connecting desert to moral intuitions, but also arguing that moral judgments can be objectively true). I have discussed the indeterminacy of desert in more detail elsewhere. See Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1308–13 (2006) [hereinafter *Desert, Democracy*]; Alice Ristroph, *The New Desert*, in CRIMINAL LAW CONVERSATIONS 47–48, 173–74 (Paul Robinson et al. eds, 2009).

55. Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 41 ARIZ. ST. L.J. (forthcoming 2009); see also Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 564 (2008) (arguing that Eighth Amendment proportionality is based on a “felt sense of justice”).

56. Bernard Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 139–40 (1999).

57. “In sentencing, however, the concept [of culpability] has hardly been studied.” VON HIRSCH, *supra* note 52, at 71. von Hirsch does not offer a conception of culpability, but does identify relevant considerations: the actor’s mental state, including both his motives and any significant mental disability, and the presence of mitigating or aggravating circumstances such as necessity or duress. *Id.* at 71–73; see also Lee, *supra* note 52, at 571–72 (following von Hirsch, but adding age, education, drug dependence, and employment records as relevant determinants of culpability).

### B. *The Elasticity of Desert Revisited*

The charge that desert is incoherent or indeterminate is not new; indeed, the theory of limiting retributivism is, in part, an effort to answer precisely that charge. Though desert cannot tell us exactly how much to punish, the limiting retributivism argument goes, it can tell us that some punishments are too much (or too little). A related defense of desert focuses on empirical findings that people assess the relative seriousness of offenses consistently. The “empirical desert” literature claims that these popular judgments should serve as the basis for sentencing policy.<sup>58</sup> When the juggling is finished, the concrete claims of both theories turn out to be relatively modest. As punishments approach extremes of severity or lenience, people will tend to object to the sanctions as too much or too little. And people seem to agree on a rank ordering of common offenses. Neither claim is particularly surprising, or particularly useful.

Modest as the contributions of limiting retributivism and empirical desert turn out to be, the new *Code* deploys both lines of argument. Rather than define gravity or culpability (or specify the determinants of harm), the Comment to § 1.02(2) simply depicts proportionality as a question of “moral intuitions” that “are almost always rough and approximate.”<sup>59</sup> Invoking Norval Morris and limiting retributivism, the Comment suggests that proportionality principles will dictate “a range of permissible sanctions that are ‘not undeserved.’”<sup>60</sup> These judgments may vary somewhat from one community to the next, but community sentiments can be empirically assessed to serve as the basis of sentencing policy. “[P]roportionality limitations in a democratic society are best derived through cooperative and collective assessment of community sentiment.”<sup>61</sup> (Somewhat contradictorily, the new *Code* also empowers judges to overrule a community’s collective assessment of desert through the power of judicial proportionality review, as discussed above.)

As early drafts of the *Code* revisions have circulated over the past few years, commentators have focused more attention on § 1.02(2) than any other aspect of the proposed changes.<sup>62</sup> The new statement of sentencing

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58. See, e.g., Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 66–67 (2007).

59. MODEL PENAL CODE: SENTENCING § 1.02(2) cmt., at 5 (Tentative Draft No. 1, 2007).

60. *Id.*

61. *Id.* at 6; see also *id.* at 31 (“Across a pluralistic nation, different people draw their moral instincts from a variety of separate yet (for them) irreducible first principles. [The *Code* requires] that there be collective input on ranges of proportionate sanctions through the informed, experienced, and diverse membership of a sentencing commission.”) (internal citation omitted).

62. See, e.g., VON HIRSCH & ASHWORTH, *supra* note 53, at 180; Michael H. Marcus, *Limiting Retributivism: Revisions to Model Penal Code Sentencing Provisions*, 29 WHITTIER L. REV. 295, 312–13 (2007); Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 17–21, 59–60, 69, 81–83 (2003); James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 86–89 (2003).



purposes has been critiqued both as too retributive and as not retributive enough.<sup>63</sup> Perhaps more swayed by the former critique, the present draft self-consciously avoids the term “retribution” and emphasizes that it is not a codification of just deserts theory.<sup>64</sup> Indeed, one gets the sense that the ALI resigns itself to a form of retributivism as a last resort, as a necessary means to the end of proportionality restrictions on punishments. If this account is correct, the ALI members are not alone.<sup>65</sup> The renewed popularity of retributive sentencing theory seems largely motivated by a search for proportionality limitations on criminal sentences.<sup>66</sup> This roundabout path to reluctant retributivism is likely to end in disappointment. Desert is not the only or best source of proportionality restrictions on criminal sentences. Indeed, proportionality principles are often invoked as limitations on government power outside the context of punishment, and it is this non-punitive proportionality that is most likely to limit the power to punish.

Before elaborating on proportionality as a principle of limited government, it is worth examining the weakness of desert-based proportionality in more detail. Most importantly, experience shows that desert does not function as an effective limiting principle. Instead, the concept of desert is sufficiently elastic that almost any existing sanction can plausibly be defended as deserved.<sup>67</sup>

For an illustration, one need look no further than the revised *Code*’s commentary. The commentary notes that California is one of a few jurisdictions to codify retribution as a controlling principle of sentencing,<sup>68</sup> but later refers to California’s Three Strikes Law to illustrate the overly severe sentences that the *Code*’s new proportionality principle would

63. See VON HIRSCH & ASHWORTH, *supra* note 53, at 180–83 (criticizing new statement of sentencing purposes as not retributive enough); Marcus, *supra* note 62, at 301–02 (criticizing new statement of sentencing purposes as too retributive); Rubin, *supra* note 62, at 17–20 (same); Whitman, *supra* note 62, at 92–95 (same).

64. MODEL PENAL CODE: SENTENCING § 1.02(2), *Reporter’s Note* 30–31 (Tentative Draft No. 1, 2007) (noting the *Code*’s avoidance of the “ideologically charged” term “retribution” and its continuing emphasis on utilitarian principles); *id.* § 1.02(2) cmt. i, at 17 (“The revised Code does not codify a ‘just deserts’ philosophy of criminal penalties.”).

65. See, e.g., Kevin Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525, 556 (2002) (“One of the chief benefits of retributive theory is that it suggests a proportional ordering of the severity of sanctions.”).

66. See, e.g., Lee, *supra* note 52, at 532 (endorsing retributivism as a means to the end of proportionality limitations on sentences); Malcolm Thorburn & Allen Manson, *The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning*, 10 NEW CRIM. L. REV. 278, 310 (2007) (book review) (“[O]ne of us embarked on this project as an unrepentant critic of just deserts. He is now a convert who accepts the fundamental role of proportionality. . .”).

67. Here I am drawing on arguments developed at greater length, with detailed examples of the elasticity of desert, in Ristroph, *Desert Democracy*, *supra* note 54, at 1308–13.

68. MODEL PENAL CODE: SENTENCING, *Reporter’s Note* 31–32 (Tentative Draft No. 1, 2007).

disallow.<sup>69</sup> Indeed, the Three Strikes Law, infamously applied in *Ewing v. California*<sup>70</sup> to support a likely life sentence for a shoplifter, has been a *bête-noire* for other recent advocates of desert as a limiting principle.<sup>71</sup> But the people who enacted and defended California's law understood it as a way to guarantee that repeat offenders would get what they deserved. Laymen's retributive principles were reflected in the law's preamble and in discussions of the law in the popular media.<sup>72</sup> Desert did not limit and seems to have facilitated Three Strikes in California.

Notably, the renewed attention to desert in Anglo-American sentencing theory coincided with the explosion of the United States prison population and the imposition of increasingly severe sentences. Correlation is not causation, of course, and desert theorists take pains to explain why they are not to blame for the more severe sentences.<sup>73</sup> But the coincidence of the resurgence in desert theory with the rapid increase in sentence severity does suggest that, at the very least, desert has failed as a limiting principle.

### C. Popular and Elite Conceptions of Desert

The inherent elasticity of desert is not the only reason it has failed as a limiting principle. Additional complications stem from the fact that academics and sentencing elites have been unable to claim exclusive authority over desert determinations. One vision of limiting retributivism is that judges and other sentencing authorities, informed by scholarly desert theories, will recognize that American sentences are now harsher than what is deserved and will reduce sentence severity accordingly. In the eyes of ordinary citizens, however, many criminals fail to get as much punishment as they deserve.<sup>74</sup> As one California resident described her support for California's Three Strikes Law, "TV gives us this 2 1/2 minute sound bite about the poor soul who stole a piece of pizza, [asking] if he deserves to spend 25 years to life in prison. Well, the truth of the matter is, he probably does."<sup>75</sup>

This conflict between populist conceptions of desert and academic or elite conceptions has appeared in many other contexts. Some scholars argue that reduced sentences in certain American states and in Western Europe were achieved through the successful implementation of desert as a

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69. *Id.* at 330.

70. 538 U.S. 11 (2003).

71. PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE* 4 (2006); Lee, *supra* note 53, at 695–99.

72. See Ristroph, *Desert, Democracy*, *supra* note 54, at 1315–18.

73. VON HIRSCH & ASHWORTH, *supra* note 53, at 102.

74. See Ristroph, *Desert, Democracy*, *supra* note 54, at 1311 n. 62.

75. Stephanie Simon, *Backers of Three Strikes Unflinchingly Defend Law*, L.A. TIMES, July 3, 1996, at A1, A16 (quoting a murder victim's mother).

limiting principle.<sup>76</sup> But with time, these alleged success stories look less successful. When elites on sentencing commissions or in other positions of power have reduced sentence lengths based on their determinations of desert, they have often been met with active resistance and legislative pushback.<sup>77</sup>

It should be noted that this critique of desert—that desert is too elastic to serve as an effective source of proportionality restraints—echoes criticisms of utilitarian punishment theory.<sup>78</sup> So, for example, some retributive theorists have acknowledged non-retributive, utilitarian accounts of proportionality, but they quickly reject those accounts as insufficiently rigorous to prevent unduly severe, but socially useful, sanctions.<sup>79</sup> The truth may be that all the mainstream justifications of punishment are subject to the charge of elasticity: applied to real-world sentencing policies, the theories can and have been invoked to justify punishments that academic experts believe are excessive.

All of this should suggest that if we are concerned with the scale of the United States prison population, we should not look to a restatement of punishment justifications for help. It is unlikely that the problem of too much punishment stems from a shortcoming of punishment theory—if anything, we may have too much punishment theory. The plethora of philosophical apologies for punishment means that rhetoric is available to defend almost any sentencing policy or any individual punishment. If we are to reduce the scale of punishment, we do not need more statements of reasons to punish. Instead, we need more attention to the costs of punishment and more skepticism about penal power.

#### D. *An Aside: Proportionality Without Desert?*

I should be clear that the critique here is aimed at desert, not at the concept of proportionality per se. I have argued previously that proportionality should be understood as a principle of limited government

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76. See Richard S. Frase, *Limiting Retributivism*, in *THE FUTURE OF IMPRISONMENT*, 83, 96, 104 (Michael Tonry ed., 2004).

77. See Ristroph, *Desert, Democracy*, *supra* note 54, at 1324.

78. See generally FRANKLIN ZIMRING & GORDON HAWKINS, *INCAPACITATION* 60–75 (1995) (arguing that theories of incapacitation are deployed to justify excessive sentences); Francis Allen, *Legal Values and the Rehabilitative Ideal*, in *SENTENCING* 110, 114 (Hyman Gross & Andrew von Hirsch eds., 1981) (criticizing theories of rehabilitation for permitting increasingly severe sentences); NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 62 (1974) (criticizing the concept of dangerousness as too vague to prevent excessive prison sentences); Paul H. Robinson & John M. Darley, *The Role of Deterrence in Criminal Law Rules: At Its Worst when Doing Its Best*, 91 *GEO. L.J.* 949, 971–75 (2003) (criticizing deterrence rhetoric as imprecise and as authorizing excessive sentences).

79. See, e.g., VON HIRSCH, *supra* note 52, at 31–32 (noting that “[t]he first systematic defense of the principle of proportionate sanctions was utilitarian,” but finding the utilitarian proportionality principle “weak and prone to exceptions”); Lee, *supra* note 53, at 738–39.

that is independent of particular theories of justified punishment.<sup>80</sup> In the sentencing context, proportionality means that the power to impose criminal sanctions is limited by various individual interests and political considerations. Claims that a punishment is disproportionately severe are most defensible when they are claims that the punishment exceeds the state's legitimate power. And it is possible to conceive of limitations on government powers without adopting particular views of the purposes underlying specific exercises of those powers. For example, we can conceive of the power to tax, and limits upon it, without adopting a particular theory of the purpose of taxation.

Indeed, the idea of proportionality reflected in the new *Code* is a peculiar historical and geographical artifact that has dominated Anglo-American retributive theory in the latter half of the twentieth century. It is the notion that to speak of proportionality in the same sentence as punishment requires adoption of a specific account of the purposes of punishment. As just noted, some retributive scholars recognize non-retributive accounts of proportionality but argue that such accounts are inferior to retributive proportionality.<sup>81</sup> A starker form of this claim has appeared in the Supreme Court's Eighth Amendment jurisprudence with Justice Scalia's assertion that "[p]roportionality . . . is inherently a concept tied to the penological goal of retribution."<sup>82</sup> This claim would be news to many courts around the world that regularly apply proportionality as a constitutional principle beyond the context of criminal justice.<sup>83</sup>

Indeed, even United States courts occasionally rely on a not-specifically-punitive concept of proportionality. The requirement in constitutional doctrine that certain coercive or intrusive state actions be "narrowly tailored" to serve "compelling state interests" reflects the principle that state power must be proportional to the interest that allegedly justifies the power.<sup>84</sup> Even more explicitly, the Court's "congruence and

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80. Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 263 (2005).

81. See *supra* note 79.

82. *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring).

83. For a description of the proportionality principle under the German Constitution, see David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 689 n.135 (2005) (stating that "Germany is credited with the invention of proportionality review"). Under the Canadian Charter of Rights and Freedoms, intrusions on individual rights may be upheld if the intrusions are "demonstrably justified in a free and democratic society." Charter of Rights and Freedoms, Constitution Act, Part I, 1982, Canada Act, 1982, ch. 11, §§ 1-4, sched. B (U.K.), as reprinted in R.S.C., No. 44 (Appendix 1985). Canadian courts apply the "Oakes test" to evaluate intrusions on individual rights; that test includes an inquiry into whether the means chosen by the government are proportional to its purpose. *Regina v. Oakes*, [1986] S.C.R. 103, 114 (Can.). For a comparative constitutional law analysis of proportionality, see Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 602-24 (1999).

84. Ristroph, *supra* note 80, at 293; see also Richard S. Frase, *Excessive Prison Sentences*,

proportionality” test asks whether congressional action under § 5 of the Fourteenth Amendment is congruent and proportional to a documented constitutional violation. Section 5 enforcement powers are triggered by specific social or political problems (e.g., discriminatory conditions), and the parameters of those powers are determined by the magnitude of the relevant problems. “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>85</sup>

Applied to criminal sentences, a similar form of proportionality analysis would inquire whether the exercise of punitive power was proportional to the problem or injury that gave rise to the power. As I have elaborated in greater detail elsewhere, the Supreme Court’s recent Sixth Amendment sentencing decisions demonstrate a mode of constitutional analysis that assesses crimes, and their constitutional significance, without any reference to theories of punishment.<sup>86</sup> By focusing on the traditional elements of crimes—conduct and mental state—we might find a way to compare crimes to one another and require proportionality without delving into punishment theory.

Though this broader, non-desert-based proportionality would be preferable to the apparently retributive proportionality of the *MPC* revisions, it should be emphasized that there are risks in relying on any form of proportionality as a tool of sentencing reform. This becomes clear when we consider the mechanisms by which proportionality is to limit sentences. For example, as a guide for legislatures and sentencing commissions, proportionality is unlikely to lead to considerable changes in practice; those decisionmakers probably don’t think the sentencing policies they have already developed are disproportionately severe.

To operationalize proportionality with meaningful results, the new *Code* looks beyond commissions and legislatures and empowers judges to conduct independent proportionality review. If this review is based on desert assessments, I suspect it is not likely to be any more popular—or tolerated in democratic systems—than previous attempts to apply elite conceptions of desert to limit majoritarian choices. Even if the *Code*’s new proportionality review were based on a broader conception of proportionality, many are likely to view such review as an undue assertion of judicial power against majoritarian choices. In the end, proportionality returns us to the questions raised in my introduction: what sort of task is sentencing, and why should it be distinctively judicial? I want to return to those questions, but to answer them, it is worth first exploring the ways in which desert analysis may limit the more scientific conception of sentencing that informs some of the new *Code*’s provisions.

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*Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 618–21 (2005).

85. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

86. Ristroph, *supra* note 80, at 319–27.

#### IV. EVIDENCE AND EMPIRICISM

As discussed above, the new *Code* displays a strong commitment to the collection and dissemination of information. It calls for transparency in the sentencing system, research on the consequences of different kinds of penalties, and “impact statements” that measure and forecast prison populations, fiscal costs, and the distribution of penalties among different demographic groups.<sup>87</sup> The *Code*’s drafters aspired to implement Norval Morris’s “evidence-based treatment penology.”<sup>88</sup> Under this approach, sentencing is more science than art: it requires the collection and analysis of empirical data, and it promises to test falsifiable propositions about the benefits of sentences.

There is an obvious tension between the new *Code*’s appeals to desert and its endorsement of “evidence-based sentencing.” Claims of desert are not falsifiable, whether or not they possess “moral reality” as claimed by some retributive theorists. And the sort of empirical data to which the *Code* urges attention—the financial impact of sentences, or disproportionate racial impacts—are irrelevant to most theories of desert. On most accounts, a moral claim that an offender deserves ten years in prison is not affected by the fact that the state cannot afford to support him, or that the offender’s incarceration will further exacerbate racial disproportions in the prison population.

The news may be even worse—judgments of “desert” may serve as an opportunity for racial bias to enter the criminal justice system. Research on capital sentencing, a context in which jurors are frequently urged to make a direct assessment of desert, reveals an unsettling tendency to find black defendants who kill white victims more deserving of death than those who commit similar crimes but with a different defendant-victim racial match-up.<sup>89</sup>

And whatever the causal relationship between the concept of desert and race and class disparities in sentencing, desert may protect those disparities from efforts to eliminate them. Most individuals who receive criminal sentences have done something illegal, even if not the precise offense of conviction. Hence, even if desert is always based on a finding of illegal action, we can safely conclude that all those poor, black men in prison deserved at least some punishment. The color and poverty of our prison population and death rows are not products of discrimination, the argument goes, but the unfortunate results of the fact that racial minorities and poor people are disproportionately involved in criminal behavior. The

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87. See *supra* text accompanying note 37.

88. MODEL PENAL CODE: SENTENCING 7–8 (Discussion Draft, 2006).

89. Ristroph, Desert, Democracy, *supra* note 54, at 1328–32.

demographic disparities are too bad, but we have to give these criminals what they deserve. The new *Code* accommodates this reasoning with its insistence that “[p]rojected numerical disparities by race or ethnicity will not always supply a sound basis for avoiding an otherwise-justified punishment policy.”<sup>90</sup>

The United States Supreme Court’s decision in *McCleskey v. Kemp*<sup>91</sup> provides a stark illustration of the defeat of empiricism by notions of desert.<sup>92</sup> Warren McCleskey challenged his death sentence as a violation of his right to equal protection. To support his claim, he introduced an empirical study of death sentences in Georgia that appeared to show patterns of racial bias.<sup>93</sup> The Court dismissed this empirical research as inconclusive, reasoning that McCleskey had failed to prove that his particular sentence was a product of intentional discrimination.<sup>94</sup> Famously, the Court “decline[d] to assume that what is unexplained is invidious.”<sup>95</sup> A theory of desert enables this choice to give the benefit of the doubt to the sentencer even in the face of empirical evidence of racial disparity. It is easier to ignore unexplained and seemingly invidious patterns if we are confident in the overall justice of what we do, and the notion of desert provides that confidence. In short, desert-thinking may contribute to biases, and even if it does not, it provides a safe harbor for racial disparity.

The moral warranty offered by desert may also sometimes insulate sentencing practices from charges of disutility. Strong public support for a particular utilitarian policy may shape public conceptions of deserved punishment, as apparently occurred in the case of California’s Three Strikes Law. At the same time, more contested claims of utility or disutility may not be subjected to rigorous scrutiny if we can avoid the conflict by retreating to desert. In fact, given that conceptions of deserved punishment are easier to expand than contract, sentencing policies originally motivated by utilitarian concerns may become immune to claims of disutility once we have convinced ourselves that the sentences are deserved. This phenomenon may be evident with respect to long prison sentences for recidivists. In many instances, the policy choice to require such sentences was originally motivated by a perceived need to incapacitate dangerous offenders, but quickly justified in terms of desert as well. Recent research suggests that these lengthy prison terms may do little to reduce crime, because offenders are incarcerated long past the age at which they are

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90. MODEL PENAL CODE: SENTENCING § 6A.07 cmt. d,138 (Tentative Draft No. 1, 2007).

91. 481 U.S. 279 (1987).

92. *Id.* In this paragraph and the next, I reprise arguments I first made in Ristroph, *supra* note 54, at 1336.

93. 481 U.S. at 286–87.

94. *Id.*

95. *Id.* at 313.

likely to commit new offenses.<sup>96</sup> But as long as discussions of sentencing policy are dominated by the rhetoric of desert, any evidence of nonutility or disutility is likely to have little impact.

When the drafters of the new *Code* call for “evidence-based penology” and for more rigorous empirical research, perhaps they hope that the facts will speak for themselves. Perhaps the hope is that once people see how much sentences cost, and how little they apparently deter, the only rational response will be to reduce the length of prison sentences and look for other alternatives. But facts never speak for themselves. Some decisionmaker must always assess the significance of facts. Someone must ask, is it relevant that an increase in the minimum sentence for drug possession will have this projected effect on the corrections budget? If punishing crack possession more severely than the possession of powder cocaine puts more black men in prison, is that itself a reason to change the policy? The danger of desert is that it preserves the possibility that some will say the costs are worth it, the inequities deserved.

I should be clear that I do not recommend that we simply redirect our faith from the gods of desert to the gods of empiricism. As just noted, empirical evidence always requires interpretation, and interpretation is always at least partially normative. The facts themselves will not tell us what to do. Bernard Harcourt has made the related argument that purportedly falsifiable claims of utility are never adequately justified by empirical evidence.<sup>97</sup> There comes a “moment when the empirical facts [run] out . . . yet the reasoning continue[s].”<sup>98</sup>

The inevitable space between theoretical or empirical premises and the final judgment derives, in the end, from that imperceptible fissure in the human sciences between the not-falsified, the not-yet-falsified, the apparently unfalsifiable, the verified but only under certain questionable assumptions, *and truth*. In the empirical domain—no less than in philosophical discourse, legal analysis, and public policy debates—proof never followed mathematical deduction, but rested instead on assertions—whether empirical or logical—that may well have been true, but for which other entirely reasonable hypotheses could have been substituted.<sup>99</sup>

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96. See, e.g., Joanna M. Shepherd, *Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth About Truth-in-Sentencing Laws*, 45 J.L. & ECON. 509, 510 (2002) (“Long sentences have little incapacitation effect on crime reduction because prisoners remain in jail at ages when they would have stopped offending.”).

97. Bernard E. Harcourt, *Post-Modern Meditations on Punishment: On the Limits of Reason and the Virtues of Randomization (A Polemic and Manifesto for the Twenty-First Century)*, 75 SOC. RES. 307, 316 (2007).

98. *Id.*

99. *Id.*



But it is one thing to be attentive to the limits of empiricism as a source of justifications for punishment, and another to dismiss it altogether.<sup>100</sup> There are ways in which better information about sentencing might improve the sentencing process, and it would be unfortunate if a revitalized rhetoric of desert were to blind us to empirical evidence of the practical consequences of our sentencing choices.

## V. CONCLUSION

So what kind of task is sentencing, and why should judges have more control over it than legislators, ordinary citizens serving as jurors (or voters), prosecutors, or sentencing commissioners? The new sentencing provisions of the MPC rightly imply that sentencing is neither strictly art nor pure science, but a complex process that requires exercises of judgment in an atmosphere of political disagreement. At their best (but unfortunately, not uniformly), the new provisions remind us that the task of sentencing is not determined by a theory of punishment. In fact, contrary to the new *Code*'s presumptions, an official endorsement of a desert-based theory of punishment might logically imply that sentencing is not a primarily judicial function, for it is not clear that judges are best equipped to make determinations of desert.

Sentencing is most appropriately a judicial task if we understand it to occur in the context of ongoing disputes. In other words, sentencing should be understood as an act of adjudication. But on this account, thinking like a sentencer is markedly different from thinking like a punisher. To the (retributive) punisher, the dispute is over once the offender has been duly convicted. Once guilt has been established, punishment is implied and the remaining question is only the scope of desert. The defendant's continuing protests, or societal concerns about cost or other consequences of the sentence, are not relevant to the desert determination.

In reality, the justification of punishment remains contested, even after a determination of guilt. Indeed, I would argue—and have argued—that punishment always remains incompletely just, imperfectly legitimate.<sup>101</sup> But even among those who disagree with this penological skepticism, there is disagreement about what, precisely, justifies punishment. More importantly, punishment is not the only thing a modern state does, and there is much disagreement about how to fit the enterprise of punishment within the larger political enterprise. The key point is that after a conviction, disputes continue. The task of sentencing is a task of negotiating those disputes.

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100. Harcourt makes the same point. *See id.* at 330–31.

101. *See, e.g.,* Ristroph, *Desert, Democracy*, *supra* note 54, at 1351; Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CAL. L. REV. 601, 621–22 (2009).

